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 Mojave Canyon, Inc.; A. William and Ranee L. Ceglia;  
 9 Robert A. and Sandra L. Cowman; Andrew and Ellen Dauscher;  
 Drs. David and Bonny Enrico; David W. and Pamela K. Sexton;  
 Evelyn Asher Sheerin, Trustee for the benefit of The Chris  
 H. Sheerin (deceased) and Evelyn Asher Sheerin 1984 Trust  
 10 Dated 5/31/84, Evelyn Asher Sherrin, Trustee of the  
 Chris and Evelyn Sheerin 1990 Trust, Sheerins Inc.;  
 Bruce Corum, Trustee of the Credit Shelter Trust, Juanita  
 N. Carter, Charles B. Anderson Trust, Rita P. Anderson  
 Trust, and Baltes Company ("JV Direct Lenders")

## UNITED STATES BANKRUPTCY COURT

### DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE COMPANY,  
Debtor.

Case No. BK-S-06-10725-LBR  
 Case No. BK-S-06-10726-LBR  
 Case No. BK-S-06-10727-LBR  
 Case No. BK-S-06-10728-LBR  
 Case No. BK-S-06-10729-LBR

USA CAPITAL REALTY ADVISORS, LLC,  
Debtor.

Chapter 11

USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,  
Debtor.

**JV DIRECT LENDERS' REPLY  
TO OPPOSITION TO MOTION  
FOR RELIEF FROM THE  
AUTOMATIC STAY (AFFECTS  
USA COMMERCIAL  
MORTGAGE CO.)**

USA CAPITAL FIRST TRUST DEED FUND, LLC,  
Debtor.

USA SECURITIES, LLC,  
Debtor.

Affects:

- All Debtors
- USA Commercial Mortgage Company
- USA Capital Realty Advisors, LLC
- USA Capital Diversified Trust Deed Fund, LLC
- USA Capital First Trust Deed Fund, LLC
- USA Securities, LLC

Hearing Date: June 15, 2006  
 Hearing Time: 9:30 am

1 Jones Vargas represents numerous direct lenders who are named beneficiaries ("JV Direct  
 2 Lenders") of certain loans which were originated and serviced by Debtor USA Commercial  
 3 Mortgage Co. (hereinafter, "Debtor" or "USA Commercial"). Specifically, Jones Vargas  
 4 represents Fertitta Enterprises, Inc.; Mojave Canyon, Inc.; A. William and Ranee L. Ceglia;  
 5 Robert A. and Sandra L. Cowman; Andrew and Ellen Dauscher; Drs. David and Bonny Enrico;  
 6 David W. and Pamela K. Sexton; Evelyn Asher Sheerin, Trustee for the benefit of The Chris H. Sheerin  
 7 (deceased) and Evelyn Asher Sheerin 1984 Trust Dated 5/31/84, Evelyn Asher Sherrin, Trustee of the  
 8 Chris and Evelyn Sheerin 1990 Trust, Sheerins Inc.; Bruce Corum, Trustee of the Credit Shelter Trust  
 9 Juanita N. Carter, Charles B. Anderson Trust, Rita P. Anderson Trust, and Baltes Company. The JV  
 10 Direct Lenders are among the roughly 3,600 direct lenders who provided funds for loans  
 11 originated and serviced by USA Commercial.

12 On May 11, 2006, JV Direct Lenders moved for relief from the automatic stay (Ct. Dkt. #s  
 13 208, 509, Motion and Section 362 Information Sheet, respectively). Response briefs were filed by  
 14 USA Commercial (Ct. Dkt. #387); the Official Committee of Equity Security Holders of USA  
 15 Capital First Trust Deed Fund, LLC (Ct. Dkt. #376); the Official Committee of Holders of  
 16 Executory Contract Rights through USA Commercial Mortgage Company (Ct. Dkt. #406); and the  
 17 Official Committee of Unsecured Creditors (Ct. Dkt. #566). On June 2, 2006, the Court approved  
 18 a stipulation to reschedule the motion hearing to June 15, 2006, and ordered the JV Direct  
 19 Lenders' to file a reply brief by noon on June 13, 2006 (Ct. Dkt. #452).

20 This reply is based upon the attached Memorandum of Points and Authorities, the  
 21 pleadings and papers on file herein, and any other material this Court may wish to consider.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24 JV Direct Lenders have contractual rights to remove USA Commercial as a servicing agent  
 25 because of its pre-petition breaches of the loan-servicing agreements. The breaches constitute  
 26 cause to grant the stay relief, thereby allowing JV Direct Lenders to change the servicing agent  
 27 when they provide evidence that fifty-one percent of all of the holders of the beneficial interest in  
 28 a loan support a change in the agent.

1 JV Direct Lenders reply below to the points raised in the briefs filed in response to its  
 2 motion.

3 **II. DISCUSSION & ANALYSIS**

4 **A. USA Commercial's and Unsecured Creditors' Objections Are Inadequate**

5 JV Direct Lenders address the objections from USA Commercial and the Unsecured  
 6 Creditors jointly because they raised similar arguments. Additionally, the Unsecured Creditors'  
 7 opposition fails because it is not supported by affidavits or declarations required by L.R.  
 8 9014(d)(1).

9 **1. USA Commercial Had Sufficient Information to Oppose Motion**

10 USA Commercial asserts that it did not have adequate information to respond to the  
 11 motion because Jones Vargas failed to file a statement of representation pursuant to Federal Rule  
 12 of Bankruptcy Procedure 2019 and this court order. For the record, Jones Vargas filed its Rule  
 13 2019 statement on May 31, 2006 (Ct. Dkt. #423), the first such statement filed by any counsel  
 14 representing multiple clients. Jones Vargas also sent USA Commercial a list of its clients on May  
 15 25, 2006, one day after USA Commercial asked for the information and prior to the response  
 16 deadline. USA Commercial also stated a list of clients would be acceptable. Ex. 1, USA  
 17 Commercial letter to Jones Vargas at 2 ("If for some reason you are unable to provide a complete  
 18 Rule 2019 disclosure at that time, I ask that you provide by that time, at a minimum, a list of each  
 19 of your clients who are movants with respect to the Motions discussed above."). Moreover, Jones  
 20 Vargas was unable to provide earlier statement because the Unsecured Creditors requested the  
 21 firm interview to be committee counsel on May 23, 2006. Jones Vargas ultimately declined one  
 22 offer to be committee counsel and promptly provided USA Commercial with a list of its clients.

23 Now USA Commercial asserts it did not have sufficient information about the JV Direct  
 24 Lenders or sufficient time to prepare a proper response. "As a consequence of this late disclosure,  
 25 USACM cannot adequately respond to the Motion for Relief." (Ct. Dkt. #387 at 6-7 n.3).  
 26 "USACM cannot reasonably be expected to be able to adequately respond to the Motion for Relief  
 27 when it does know [sic] what Serviced Loans are at issues, or the JV Direct Lenders interest in  
 28 those loans." *Id.* at 6.

1 USA Commercial's assertions are not credible. As the loan servicing agent, it has the  
 2 records documenting JV Direct Lenders' loans and interests. Moreover, JV Direct Lenders'  
 3 motion for stay relief is premised on the loan-servicing agreement. The agreement is a simple  
 4 form prepared by USA Commercial, used with each lender involved in this case, and identical in  
 5 all material respects in each loan. The record contains numerous copies of the agreement,  
 6 including one attached to JV Direct Lenders' motion (Ct. Dkt. #208 at Ex. A). Indeed, USA  
 7 Commercial did not have a problem drafting and filing a thirteen-page opposition based on the JV  
 8 Direct Lenders' documents filed with their motion (Ct. Dkt. #387). Whether USA Commercial  
 9 thinks it had adequate information about the JV Direct Lenders' interests is immaterial, as the  
 10 motion asks a simple legal question: Whether lenders may change servicing agents pursuant to  
 11 the contract terms.

12 **2. JV Direct Lenders Acknowledge They Still Must Satisfy Contractual Terms**

13 JV Direct Lenders acknowledge that the loan servicing contract does not authorize an  
 14 agent change without "approval of fifty-one percent (51%) or more of all of the holders of the  
 15 beneficial interest of record in the Loan," and that JV Direct Lenders do not constitute at least  
 16 fifty-one percent of all of the holders of the beneficial interest in their loans. However, the JV  
 17 Direct Lenders believe it is prudent to seek the Court's advance authorization in order to change  
 18 servicing agents if and when the JV Direct Lenders and others constitute fifty-one percent of all of  
 19 the holders of the beneficial interest. JV Direct Lenders do not—and never have—intended to  
 20 remove USA Commercial as a servicing agent until such time.

21 In terms of the exact requirements to change the servicing agent, JV Direct Lenders  
 22 attempted to harmonize Paragraphs 3 and 8 of the contract by stating that they must have fifty-one  
 23 percent of all of the holders of the beneficial interest and provide thirty-days notice to change  
 24 agents (Ct. Dkt. #208, Motion at 6). USA Commercial responds that "paragraph 8 does not  
 25 govern the removal of USACM as the loan servicer of one of the Serviced Loans" (Ct. Dkt. #387,  
 26 USA Commercial Opposition at 7). JV Direct Lenders accept USA Commercial's interpretation  
 27 in this regard. Therefore, JV Direct Lenders may remove USA Commercial as the servicing agent

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immediately upon evidence that a fifty-one percent of all of the holders of the beneficial interest in  
a loan agree with the replacement, pursuant to Paragraph 3 of the servicing agreement.

### **3. USA Commercial's Breach Constitutes Cause for Stay Relief**

4 USA Commercial and the Unsecured Creditors both assert that USA Commercial's pre-  
5 petition breach does not constitute cause necessary to justify stay relief (Ct. Dkt. #387, USA  
6 Commercial Opposition, *citing Matter of Holly's, Inc.*, 140 B.R. 643, 689 (Bankr. W.D. Mich.  
7 1992); #566, Unsecured Creditors Opposition, citing *Holly's* and *In re Tashjian*, 72 B.R. 968, 973-  
8 74 (Bankr. E.D. Pa. 1987)). JV Direct Lenders disagree, in light of (1) the severity of USA  
9 Commercial's pre-petition illegal conduct and (2) USA Commercial's admission of a continuing  
10 violation of Nevada state law by collecting its servicing fee from post-petition borrower payments  
11 without advancing the payments to the lenders.

In terms of a legal basis, JV Direct Lenders notes that *Holly's* involved proposed relief stay premised on mismanagement, not breach. 140 B.R. at 688-89. Even if mismanagement and breach are equated, *Holly's* also recognized authority that pre-petition mismanagement may provide cause for relief stay. *Id.* at 689, citing *Powers Aero Marine Servs., Inc. v. Merrill Stevens Dry Dock Co. (In re Powers Aero Marine Servs., Inc.)*, 42 B.R. 540, 546 (Bankr. S.D. Tex. 1984). The other cited case, *Tashjian*, also recognized that pre-petition breaches may constitute good cause for stay relief. 72 B.R. at 973, citing *In re Lexington Racquetball Club, Inc.*, 58 B.R. 103 (Bankr. E.D. Pa. 1986), *In re Tainin*, 48 B.R. 250 (Bankr. E.D. Pa. 1985), and *In re Rush*, 9 B.R. 197 (Bankr. E.D. Pa. 1981).

21 JV Direct Lenders' own research also reveals authority holding that a breach constitutes  
22 good cause to grant relief from the automatic stay. For example, the Bankruptcy Court for the  
23 Central District of California held that cause existed when a debtor failed to make payments in  
24 breach of the requirements of a prior confirmed plan. *Lomas Mortgage USA, Inc. v. Elmore (In re*  
25 *Elmore)*, 94 B.R. 670, 678 (Bankr. C.D. Cal. 1988); *In re Gilpin*, 209 B.R. 490, 493 (Bankr. W.D.  
26 Mo. 1997) (same). In another case, the court held the debtor's rejection of a lease is a breach of  
27 contract, which "constitute[s] cause under Section 362(d)(1) for the lessor to seek relief from the  
28 stay." *In re Palace Quality Servs. Indus., Inc.*, 283 B.R. 868, 906 n.40 (Bankr. E.D. Mich. 2002).

1           In each case, the court held that the debtor's breach of a pre-petition obligation constituted  
 2 good cause to grant relief from the automatic stay. In the present case, USA Commercial is  
 3 undisputedly in breach of the loan servicing agreement because it did not keep proper account  
 4 records, diligently collect all payments, promptly pay each lender, or foreclose or take other  
 5 necessary action when borrowers failed to pay on their loans. USA Commercial acknowledges it  
 6 is in pre-petition breach, although it tries to minimize its problems by admitting to "certain  
 7 irregularities" (Ct. Dkt. #387 at 9). This recharacterization of its conduct is inconsistent with the  
 8 findings of the State of Nevada's Division of Mortgage Lending, which found USA Commercial  
 9 violated numerous violations of the Nevada Revised Statutes and Nevada Administrative Code.  
 10 Ex. 2, Order Conditioning Mortgage Broker's License. USA Commercial breached its loan  
 11 servicing agreements and violated state law, and JV Direct Lenders are allowed to select a new  
 12 servicing agent pursuant to the contract terms and state law. Therefore, cause exists to grant JV  
 13 Direct Lender's motion for relief from the automatic stay to hire a new servicing agent.

14           Moreover, USA Commercial admits that it is collecting its servicing fee from the lender  
 15 payments without forwarding the payments to JV Direct Lenders and other similarly situated  
 16 (#387, USA Commercial Opposition at 4, ¶ 10). This conduct violates Nevada Revised Statute  
 17 645B.175(5)(a), which requires a mortgage agent to release lender payments "upon the deduction  
 18 and payment of any fee or service charge due the mortgage broker." See Ct. Dkt. #377, JV Direct  
 19 Lenders' Opposition to Debtors' Motion to Temporarily Hold Funds, for additional discussion.  
 20 Since USA Commercial is collecting its service fees from borrower payments without forwarding  
 21 the payments to the lenders, it is violating state law. This continued, post-petition misconduct is  
 22 further evidence that causes exists to warrant relief from the automatic stay.

23           **4. Stay Relief for JV Direct Lenders Does Not Undermine Purpose of Bankruptcy**

24           USA Commercial and the Unsecured Creditors also assert that stay relief undermines the  
 25 purpose of bankruptcy (Ct. Dkt. #387, USA Commercial Opposition; #566, Unsecured Creditors  
 26 Opposition). JV Direct Lenders do not dispute the purpose of bankruptcy,<sup>1</sup> but assert that stay

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27  
 28           <sup>1</sup> However, JV Direct Lenders object to mischaracterizations by the Unsecured Creditors concerning the relevancy of  
 certain issues in bankruptcy. The Unsecured Creditors asserts the JV Direct Lenders won't be harmed by USA

1 relief is not violative in the context of their role as lenders and USA Commercial's role as  
 2 servicing agent.

3 As USA Commercial explained, "the legislative history of the Bankruptcy Code makes  
 4 clear that one of the purposes of the automatic stay is to give a debtor a 'breathing spell from his  
 5 creditors'" (Ct. Dkt. #387 at 11, quoting *In re Sherman*, 441 F.3d 794, 814 (9th Cir. 2006)  
 6 (emphasis added by JV Direct Lenders). The automatic stay also provides for "an orderly  
 7 liquidation procedure under which all creditors are treated equally." *Id.* (emphasis added by JV  
 8 Direct Lenders).

9 However, JV Direct Lenders are not creditors. A creditor is "one to whom a debt is owed;  
 10 one who gives credit for money or goods." *Black's Law Dictionary* 304 (Brian A. Garner ed.,  
 11 abridged 7th ed. 2000). JV Direct Lenders have not loaned money to USA Commercial; USA  
 12 Commercial's sole role as servicing agent is as a conduit moving money lent by JV Direct Lenders  
 13 to the borrowers, and subsequent borrower payments to JV Direct Lenders. Since JV Direct  
 14 Lenders are not creditors, they are entitled to stay relief without interfering with the underlying  
 15 purpose of bankruptcy.

16 **B. Equity Security Holders Committee Do Not Articulate A Basis for Its Opposition**

17 The Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund,  
 18 LLC filed a statement in opposition several motions, including the JV Direct Lenders' motion for  
 19 relief from the automatic stay (Ct. Dkt. #376). However, the statement does not address JV Direct  
 20 Lenders' requested relief, the ability to change servicing agent. Therefore, the committee's  
 21 opposition has no bearing on the decision concerning JV Direct Lenders' motion.

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25 Commercial's continued role as servicing agent, and that they would receive little benefit under a new servicing  
 26 agent. The arguments are inapposite. USA Commercial entered into a contract with each JV Direct Lender that  
 27 authorizes the JV Direct Lender to change servicing agents if USA Commercial breaches the contract. USA  
 28 Commercial is in pre-petition breach. There is no additional requirement that the JV Direct Lender continue to suffer  
 harm or demonstrate it can secure a better deal elsewhere. The JV Direct Lenders have a contractual right to change  
 servicing agent, and they seek an order allowing them do so when they and other lenders represent fifty-one percent  
 of all of the holders of the beneficial interest in a loan.

1       **C. Executory Contract Rights Committee Supports the General Right to Change Agents**

2           The Official Committee of Holders of Executory Contract Rights through USA  
3           Commercial Mortgage Company supports the position that direct lenders are authorized by  
4           contract and state law to remove USA Commercial as the servicing agent if they have approval of  
5           at least 51 percent of the direct lenders (Ct. Dkt. #406). However, the committee opposes JV  
6           Direct Lenders' motion only because the JV Direct Lenders have not established that they  
7           constitute 51 percent of the direct lenders in any loan.

8           Again, JV Direct Lenders acknowledge that the loan servicing contract does not authorize  
9           an agent change without fifty-one percent of all of the holders of the beneficial interest in a loan,  
10          and that JV Direct Lenders do not constitute at least fifty-one percent in their loans. However, the  
11          JV Direct Lenders believe it is prudent to seek the Court's advance authorization in order to  
12          change servicing agents should the JV Direct Lenders and others constitute fifty-one percent. JV  
13          Direct Lenders do not—and never have—intended to remove USA Commercial as a servicing  
14          agent until they and others in agreement constitute fifty-one percent of all of the holders of the  
15          beneficial interest in a loan.

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## **IV. CONCLUSION**

2 USA Commercial has failed to satisfy the terms of its Loan Servicing Agreements with the  
3 JV Direct Lenders. Due to USA Commercial's failures, the JV Direct Lenders seek to execute  
4 their contractual rights to terminate their servicing contracts with USA Commercial and hire a new  
5 servicing agent. Therefore, the JV Direct Lenders move for relief from the automatic stay in order  
6 to terminate USA Commercial as the servicing agent on their loans.

DATED this 13<sup>th</sup> day of June, 2006.

## JONES VARGAS

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## CERTIFICATE OF SERVICE

1. On June 13, 2006, I served the following document(s):

**JV DIRECT LENDERS' REPLY TO OPPOSITION TO  
MOTION TO OBTAIN RELIEF FROM AUTOMATIC STAY  
(AFFECTS USA COMMERCIAL CO.)**

2. I served the above-named document(s) by the following means to the persons as listed below:

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 Phoenix, AZ 85004-2385

11 Thomas W Stilley  
 12 1000 SW Broadway #1400  
 Portland, OR 97205

13 Gregory J Walch  
 14 400 S Fourth St 3rd Floor  
 Las Vegas, NV 89101

15 William E Winfield  
 16 POBox 9100  
 Oxnard, CA 93031

17 Marion E. Wynne  
 18 Wilkins, Bankester, Biles & Wynne, P.A.  
 Post Office Box 1367  
 Fairhope, AL 36533-1367

19       **9 c. Personal Service** (list persons and addresses):  
 I personally delivered the document(s) to the persons at these addresses:

20       **9** For a party represented by an attorney, delivery was made by  
 handing the document(s) to the attorney or by leaving the document(s) at  
 the attorney's office with a clerk or other person in charge, or if no one is in  
 charge by leaving the document(s) in a conspicuous place in the office.

21       **9** For a party, delivery was made by handing the document(s) to the  
 party or by leaving the document(s) at the person's dwelling house or usual  
 place of abode with someone of suitable age and discretion residing there.

22       **: d. By direct email (as opposed to through the ECF System)** (list persons  
 and email addresses):

JONES VARGAS  
 100 W. Liberty Street, 12<sup>th</sup> Floor  
 P.O. Box 281  
 Reno, Nevada 89504-0281  
 Tel: (775) 786-5000 Fax: (775) 786-1177

1                   Based upon the written agreement of the parties to accept service by email  
2                   or a court order, I caused the document(s) to be sent to the persons at the  
3                   email addresses listed below. I did not receive, within a reasonable time  
4                   after the transmission, any electronic message or other indication that the  
5                   transmission was unsuccessful.

6                   **9 e. By fax transmission** (list persons and fax numbers):

7                   Based upon the written agreement of the parties to accept service by fax  
8                   transmission or a court order, I faxed the document(s) to the persons at the  
9                   fax numbers listed below. No error was reported by the fax machine that I  
10                  used. A copy of the record of the fax transmission is attached.

11                  **9 f. By messenger:**

12                  I served the document(s) by placing them in an envelope or package  
13                  addressed to the persons at the addresses listed blow and providing them to  
14                  a messenger for service. (A declaration by the messenger must be attached  
15                  to this Certificate of Service).

16                  **I declare under penalty of perjury that the foregoing is true and correct.**

17                  DATED this 13<sup>th</sup> day of June, 2006.

18                  \_\_\_\_\_  
19                  J. Englehart & Tawney Waldo  
20                  Name

21                  \_\_\_\_\_  
22                  //s// Tawney Waldo & J. Englehart  
23                  Signature

24                  JONES VARGAS  
25                  100 W. Liberty Street, 12<sup>th</sup> Floor  
26                  P.O. Box 281  
27                  Reno, Nevada 89504-0281  
28                  Tel: (775) 786-5000 Fax: (775) 786-1177